No. 39.
Petition for Rehearing.
Rec'd & Dist'd Mar. 31, 1902
OFFICE SUPREME COURT U.S.
RECEIVED
MAR 31 1902

Supreme Court of the United States.

OCTOBER TERM, 1901.

NO. 39.

ALBERT H. WAITE

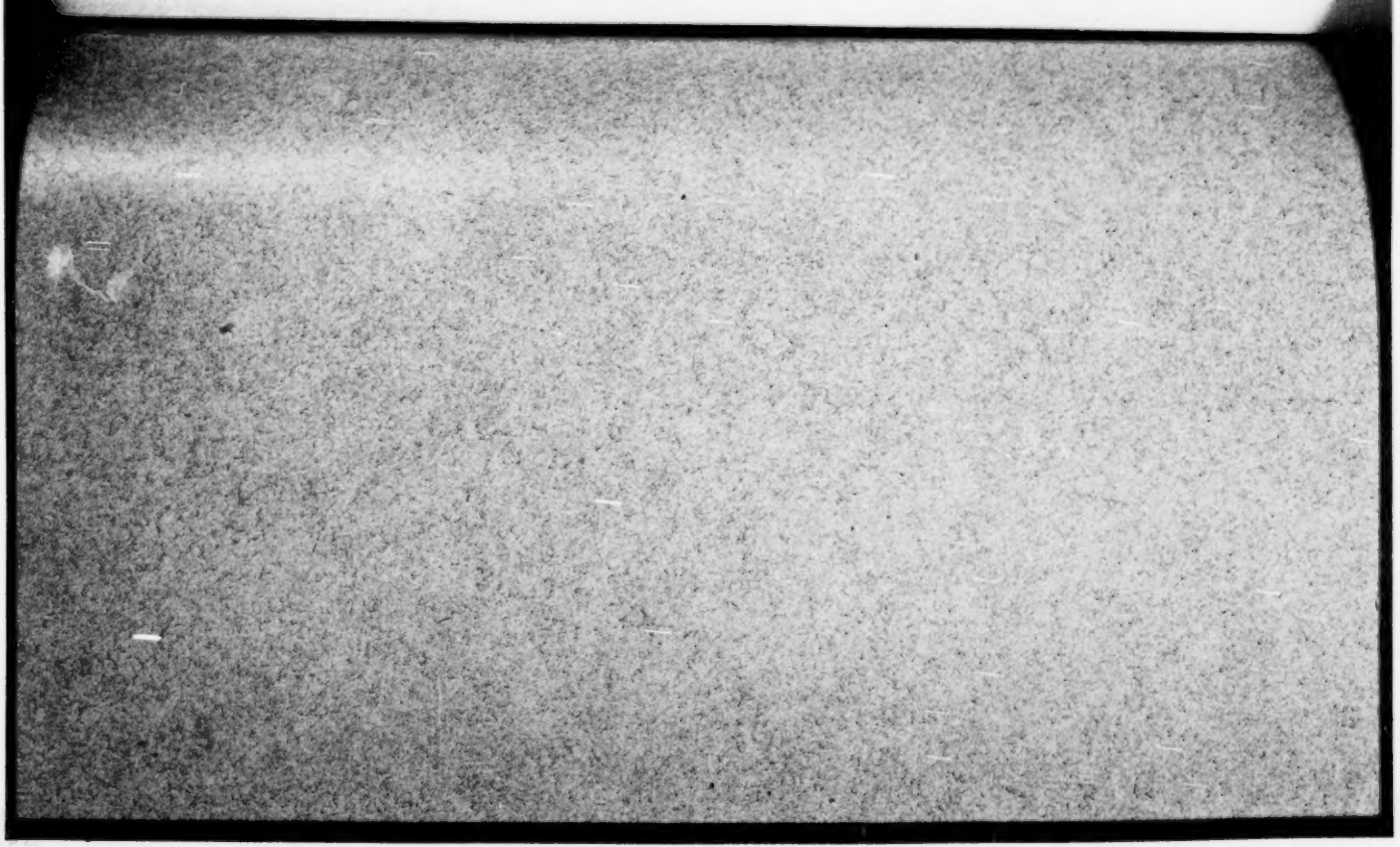
vs.

THE CITY OF SANTA CRUZ.

PETITION FOR REHEARING FILED ON BEHALF OF CITY OF SANTA CRUZ.

FREDERIC R. COUDERT, Jr.,
PAUL FULLER,
Counsel.

F. J. FICKER, PRINTER, 5 DUTCH STREET, N. Y.



Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 39.

ALBERT H. WAITE,

v.

THE CITY OF SANTA CRUZ.

Petition for rehearing filed on behalf of the City of Santa Cruz.

The City of Santa Cruz respondent in the above cause respectfully presents its petition to the Honorable Court for a rehearing of this case (the mandate herein not having issued) and sets forth the reasons urged in behalf of its application.

I.

Preliminary.

In filing this petition counsel are fully conscious of the reluctance of this Court to grant rehearings in cases heard and already determined. They are impressed by and entirely appreciate the careful consideration given to the case and

the length of time during which it was under consideration.

Nor are counsel unmindful of the fact that the practice of rehearing causes does not commend itself to this Court ; as was said by the eminent Chief Justice TANEY many years ago,

> " If this Court should accept a practice analogous to that of the English Chancery, we should soon find ourselves in the same predicament and we should be hearing over again at a second term almost all the cases which we had heard and adjudged at a former one, and upon which our own opinions would have been definitely made up upon the first argument."
>
> Brown *et al. v.* Aspaden *et al.*
> 14 Howard, 24.

Yet even with these considerations before them, counsel believe that the peculiar circumstances of this case, the condition of American jurisprudence regarding the questions involved, and especially the rulings of this Court upon the vastly important questions arising out of the issue of municipal securities would justify a rehearing and that such reargument and reconsideration might tend to harmonize decisions of this Court as well as accord to petitioner the protection of his just claims.

Well aware of the familiarity of the Court with the facts in this cause, counsel will state in the fewest possible words petitioner's contentions, avoiding all elaborate argument and numerous citations.

II.

Grounds of and Reasons for Rehearing.

The three grounds upon which the petitioner relies are :

A.—THE DECISIVE QUESTION IN THE CASE HAS BEEN OVERLOOKED OR MISAPPREHENDED.

B.—THE DECISION PRACTICALLY INVOLVES THE OVERRULING OF ANOTHER CASE UNANIMOUSLY DECIDED BY THIS COURT AND FROM WHICH THE PRESENT CASE HAS NOT BEEN DISTINGUISHED.

C.—THE QUESTION OF THE *bona fides* OF WALLACE AND COMPANY INVOLVING THE VALIDITY OF THE GREATER PART OF THE CLAIM SUED UPON WAS NOT SPECIFICALLY CONSIDERED, AS FAR AS PETITIONER CAN JUDGE FROM THE OPINION, ALTHOUGH THE INCIDENTAL DECISION OF THAT POINT INVOLVES THE ADOPTION OF A RULE OF FAR-REACHING CONSEQUENCE AT VARIANCE WITH DECISIONS OF IMPORTANCE IN STATE COURTS.

The reasons, concisely stated, in support of these grounds, are as follows :

A., B.

The theory upon which the opinion of the Court proceeds is that enunciated in and sanctioned by the case of Chaffee County *v.* Potter, 142 U. S., 355, subsequently reiterated and affirmed in Gunnison County Comm'rs *v.* Rollins, 173 U. S., 255.

The doctrine there laid down, which is now indisputably the law in courts of the United States and which we have no disposition to doubt or question, is this : where a statute grants to a municipal corporation—including in that term both its officers and all its citizens or electors—the power to issue bonds, and prescribes certain acts to be done by the city either prior to or concomitant with the issue of such bonds, the city may by reciting in the bonds that all the said acts have been duly performed in accordance with the law, estop itself from alleging, as a matter of defense, that any of said acts were omitted or irregularly or improperly performed. None of the cases have stated the doctrine, we respectfully submit, more broadly than this.

Did the case at bar fall within the purview of this rule or involve the application of this principle we could only acquiesce in the necessity for deciding the case in favor of the *bona fide* holders of the bonds—no other result would, upon the authorities, be possible.

The doctrine, however, which we invoke and which is applicable to, and in the view of counsel, decisive of the case at bar is equally supported by authority and in no wise in conflict with Chaffee County *v.* Potter and Gunnison Co. Comm'rs. *v.* Rollins. That doctrine is, that in case the enabling statute directs the recording of facts, the existence of which is necessarily antecedent to and a condition of the issuance of the bonds, the purchaser must refer thereto or take the bonds at his peril. That this is a fair statement of the

rule, appears from the following short citations :

> " If the fact necessary to the existence of the authority was by law to be ascertained, not officially by the officers to be charged with the execution of the power, but by reference to some express and definite record of a public character, then the true meaning of the law would be that the authority to act at all would depend upon the actual objective existence of the requisite fact,* as shown by the record, and not upon its ascertainment and determination by any one; and the consequence would necessarily follow that all persons claiming under the exercise of such a power might be put to the proof of the fact made a condition of its lawfulness, notwithstanding any recitals in the instrument."
>
> Dixon *v.* Field, 111 U. S., 93,

or as lucidly and tersely expressed by the learned Mr. Justice Gray.

> " But if the statute expressly requires those facts to be made a matter of public record, open to the inspection of every one there can be no implication that it was intended to leave that matter to be determined and concluded contrary to the facts so recorded, by the officers charged with the duty of issuing the bonds."
>
> Sutliff *v.* Lake County Commissioner, 147 U. S., 235.

In the California statute it will be noticed that the words " whenever any city has an outstanding indebtedness evidenced by bonds and warrants thereof," etc. are equivalent to the expression

* In the case at bar, the existence of an indebtedness of the city evidenced by its bonds.

"*any* city having an indebtedness evidenced," etc. This makes the meaning obvious. It is as though the Statute provided that "any city having a population of more than one thousand inhabitants may refund," etc.

The sole question then is as to what is to determine the existence of the state of facts which the statute requires.

The indebedness must be evidenced by bonds and warrants of the city, but how is the existence of such bonds and warrants to be determined?

If this is a question to be determined solely by the town officers, then their recital must bind the city, under the doctrine of Chaffee County *v.* Potter.

If on the other hand the statute provides that the jurisdictional fact be embodied in any writing or record the purchaser must refer thereto or take the bonds at his peril.

Sutliff *v.* Lake Co. Comm'rs,
147 U. S., 235.

Apply this criterion to the case at bar.

The enabling act under which the city issued the bonds provides :

"§1. That whenever any incorporated city or town other than cities of the first class in this State has an outstanding indebtedness *evidenced by bonds and warrants thereof* the common council, etc., shall have power to submit to the qualified voters, etc., the question *of refunding such indebtedness.* * *

Said election shall be called and held in the same manner as other elections are held in such city or towns. *The notice of such election shall re-*

*cite the indebtedness to be refunded together with * * * all other details of the bonds proposed to be issued.*"

Did the statute make no provision for the election notice and its contents the rule in Chaffee County *v.* Potter would apply.

If, on the other hand, the Legislature out of abundant caution has provided in the statute for any record or documentary attestation of the jurisdictional fact upon which the power of the city depends, then the doctrine of Sutliff *v.* Lake Co. Commissoners applies and the purchaser must look beyond the recitals in the bonds to the record itself.

In the latter case the County Commissioners, *the same persons who were to issue the bonds*, were to prepare certain statements.

The statute of Colorado enacts :

> "It shall be the duty of the board of county commissioners of each county to make out semi-annual statements at the regular sessions in January and July, at which time they shall have such statements published, etc., and such statement shall show the amount of debt owing by their county, in what the debt consists," etc., 147 U. S., 232.

The election notice in the case at bar was to contain a statement of the indebtedness to be refunded.

There is only one possible distinction (not suggested in the opinion of the honorable Court) between these two statutes. The Colorado statute provides that

> " the statements of indebtedness must be published in a newspaper, and shall also

> be entered of record by *the clerk of the board* of county commissioners in a book to be by him kept for that purpose only, which book shall be open to the inspection of the public at all times."

It must, therefore, be conceded (if the Sutliff case stands) that had the California statute provided that the City Clerk should enter the notice of election in a book open to public inspection, the Court would have decided this case differently.

The two statutes would then have been *absolutely* analogous. The sole point therefor upon which the decision herein can logically be sustained is upon the omission in the California statute of the word record. Had the statute added to the words "the notice of such election" the further words, to be *entered of record by the town clerk*, this case must have been decided in favor of the city.

Is this omission material and is not the suggested distinction wholly untenable?

The notice must contain certain information and must be issued by the city authorities. It must evidently be in writing and in so far is similar to the requirements for the debt statements of the Colorado statute. A municipal corporation is a public governmental body. Its legal acts are and must be of record, and the Court will take judicial notice of this. No one would be allowed to plead that he was ignorant of the fact that municipal corporations keep records.

> "A record in its broad and general sense is a memorial of what has been done; authentic written evidence consid-

ered as either public or private, but usually public. It is a written account of some act, transaction or instrument drawn up, under authority of law, by a proper officer, and designed to remain as a proper memorial or permanent evidence of the matters to which it relates."

Am. and Eng. Encyc. of Law, Art. , Record .

A municipal body can only act through its officers in their corporate capacity. They must act as a unit---*and the act of such a body in issuing a written notice required by statute is sufficient to constitute a record.* Even a pencil writing made by a town council has been considered a record.

Franklin *v.* Tiernan, 62 Texas, 92.

Hence nothing would have been added to the force of the statute by the addition of the words used in the Colorado law. They would have been mere surplusage.

In addition to these general considerations there are additional ones peculiar to this case which would seem conclusive.

The statutes of California prescribe that the resolutions and ordinances (*i. e.*, the official acts of the city) shall be kept "in large, well bound and uniform and suitable books."

As was aptly said by the Supreme Court of Ohio:

> "The members comprising the Board have no power to act as a board except where together in session. They then act

> as a body or unit. The statute requires the clerk to record, in a book to be furnished for that purpose, all their official proceedings."
>
> McCartle *v.* Bates, 29 Ohio St., 419.

It is, however, quite idle to contend that the notice of election is not of itself a record. Whether it is embodied in an ordinance or resolution which itself constitutes a record is immaterial.

This particular statute provides minutely for the making of a particular notice by the city officials. That meets the requirements laid down by this honorable Court.

If the city officials had not made the notice the case would be the same as though the Commissioners should have failed to make the semi-annual statement called for by the Colorado statute, and other and different questions might then arise. Here it is admitted that the notice was made and was of record. *Jam satis.*

The Honorable Court in the opinion in this case says :

> "As there was power in the city to issue refunding bonds to be used in discharging its outstanding indebtedness of a specified kind, purchasers were entitled to rely upon the truth of the recitals in the bonds that they were of the class which the act of 1893 authorized to be refunded. *They were under no duty to go further and examine the ordinances of the city to ascertain whether the recitals were false.*"
>
> Opinion of Mr. Justice Harlan, p. 14.

To this proposition we give entire assent. The purchasers were under no obligation to examine the ordinances of the city *qua* ordinances.

Ordinances need not be examined for the purpose of verifying the recitals made in bonds as to matters within the jurisdiction of the officers issuing them. Why? Because the Statute does not require such an ordinance as a prerequisite to the issue of such bonds.

But in this case the purchaser *was* required to examine, not an ordinance, but the *notice of election.* Why? Because the Statute made such notice and the specific facts to be embodied in such notice, a prerequisite to the authority to issue the bonds.

The fact that such notice of election was included in an ordinance was a mere incident. The notice should have been looked to, wherever it might be recorded.

The expression above quoted from the opinion has lead your petitioner to assume that the proposition upon which he conceives his rights to rest was not present to the minds of the learned Court.

Unless, therefore, the decision in this case is intended to annul the decision in Sutliff *v.* Board of County Commissioners and similar cases, your petitioner most respectfully urges that he should have an opportunity to be reheard.

III.

C.

The second ground upon which the petitioner relies is that the effect of the decision herein if adhered to would be to overturn certain well settled principles of law, overruling Federal and State decisions.

The opinion makes it evident that such result was not intended.

If it was intended to establish new rules of law it is fair to presume that the Court would have stated them explicitly, rather than have left them to be inferred from the judgment.

The decision that Wallace and Company were *bona fide* holders cannot be maintained upon any principles of law heretofore judicially established. The inference that the decision can be supported only by a modification of acknowledged principles is unavoidable.

Our position is that:

I.—Prince and Company were the agents of Wallace and Company and had knowledge of the invalidity of the bonds (Finding of Fact Record, p. 24).

II.—That the law will impute such knowledge to Wallace and Company.

The only expression in the opinion of the Court which seems to have any bearing on the *bona fides* of Wallace and Company is the following:

> "The Circuit Court having found—and, as we think, correctly—that the assignors of the plaintiff were *bona fide* purchasers, without notice of anything affecting the truth of the recitals in them, our conclusion is that the city cannot escape liability by reason of the fact disclosed by its ordinances, that the 89 first mortgage bonds of the Water Company assumed by the city were included in its refunding scheme" (Opinion, p. 14).

The finding of fact as to the relations between Wallace and Company and Prince and Company we willingly abide by and rely upon, *but* the legal conclusion deduced therefrom by the Circuit Court is so revolutionary of elemental legal principles that we seriously doubt the intention of this honorable Court to sanction it. Certainly, it has not done so explicitly.

The finding of fact referred to is as follows:

> "and in relation to E. G. and E. Wallace from whom the plaintiff derives the legal title to the remaining bonds and coupons sued on, the Court finds that on or about September 22, 1894, E. G. and E. Wallace, assignors of plaintiff, purchased from Coffin and Stanton 150 of the said bonds and coupons referred to in the preceding finding, including eight of the bonds and coupons sued on in this action, giving in exchange therefor 435 shares of the stock of the Page Belting Company and $115,000 in cash. Said purchase and exchange was made by the firm of F. H. Prince and Company *acting as agents of E. G. & E. Wallace*, and also acting for Coffin and Stanton *in the same transaction*. The firm of F. H. Prince and Company received of E. G. and

E. Wallace, as their agents in effecting the sale of the Page Belting stock, the sum of two thousand five hundred dollars, and said Coffin and Stanton agreed to compensate said F. H. Prince and Company for their services rendered to them in the same transaction by a division of all the profits which should be realized by said Coffin and Stanton upon a re-sale of the said shares of stock of the Page Belting Company. At the time of the said sale of the refunding bonds by the defendant city to E. G. and E. Wallace and Company the said firm of F. H. Prince and Company had notice of all matters related in the ordinances of defendant numbered 314, 315 and 320, hereinbefore referred to in the preceding findings. The said F. H. Prince and Company did not communicate their said knowledge to E. G. and E. Wallace and Company, and the said E. G. & E. Wallace had no actual knowledge or actual notice of any of said matters, nor actual notice of any fact tending to impeach the truth of the recitals contained in said bonds—and unless the notice to F. H. Prince and Company is to be imputed as notice to them, the said E. G. and E. Wallace had no constructive notice of the facts recited in said ordinances, or any facts tending to impeach the truth of the recitals contained in said bonds" (Record, p. 24).

From which the Circuit Court curiously enough deduced this conclusion:

"That E. G. and E. Wallace were *bona fide* purchasers of the bonds and coupons assigned by them to plaintiff, without notice of the facts recited in the ordinances of the defendant numbered 314, 315 and 320, and

without notice of any fact tending to impeach the truth of the recitals contained in said bonds" (Record, p. 25).

It has been suggested that the knowledge of Prince and Company was obtained in another transaction, but this is a wholly untenable suggestion. The finding itself explicitly twice speaks of the matter as the "*same transaction.*"

Wallace and Company purchased the bonds in question, paying therefor in stock and cash. That the transaction was partly a sale and partly an exchange is immaterial. The legal elements of both are the same, and the attempt by some metaphysical writers to differentiate the two by treating a sale as one transaction and an exchange as two is unsound and unsupported. It can have no bearing here.

> "*Sale or exchange* is a transmutation of property from one man to another in consideration of some price or recompense in value * * * If it be a commutation of goods for goods it is more properly an exchange; but if it be a transferring of goods for money it is called a sale. * * * But with regard to the law of sales and exchanges there is no difference. I shall, therefore, treat of them both under the denomination of sales only." (Blackstone, Ch. 30, 447.)

The French Civil Code provides;

> "§ 1702, An exchange is a contract by which the parties give respectively to each other one thing for another;"
>
> "§ 1707. All the other rules set down for contracts of sale shall moreover apply to exchanges." (Cachard, Code Civil.)

The transaction, whether sale or exchange, was

one whole, complete, indivisible transaction. The transfer of the Belting stock and cash from Wallace to Coffin and Stanton and the transfer of the Santa Cruz bonds from them to Wallace and Company were interdependent and synchronous constituting one legal act.

This being clear we will apply to this transaction the settled rules of agency with a view of determining the effect which the knowledge of Prince and Company obtained in this single transaction had upon Wallace and Company.

In stating these rules we will for the sake of brevity avoid the citation of authorities and endeavor to state the law so that even the eminent counsel for the plaintiff cannot question its correctness—at least apart from the decision of the Circuit Court in this very case.

The rules of law on this point are:

I.—*Qui facit per alium facit per se;* hence as a matter of justice and public policy a principal cannot plead ignorance of facts within the knowledge of his agent and thus gain benefits to which he would not be entitled had he himself possessed such knowledge. Without this rule, one acting through an agent would have an undue advantage over those acting directly and the agent acting *mala fide* could reap the fruits of a transaction for his principal which in equity and conscience he could not reap for himself.

In other words, no one is licensed to commit vicarious fraud. This settled rule is no mere presumption of law or fact that the agent will communicate his knowledge to the principal. If that were so the principal would be at liberty to show that actually, and in fact he was without

such knowledge; that such defence cannot be pleaded is conclusively demonstrative that the rule is no mere presumption but a positive rule of law.

II.—If the apparent agent acts fraudulently, in violation of his fiduciary relation, the rule cannot apply because the fraud ruptures the relation, and it can no longer be said that the apparent principal is acting through another; the acts of the agent cease to be his acts; *qui facit per alium facit per se* ceases to apply. Besides if the transactions were fraudulent other principles of law are applicable to protect the principal and third parties who may have suffered.

III.—The knowledge must be present to the mind of the agent, that is, the agent himself, must actually have the information, otherwise it would not be just to charge his principal therewith; not so much because of any presumption that the agent will communicate the knowledge but because, if not present to his mind the transaction cannot have been affected by it. His act was *bona fide*, and, therefore, no moral (and consequent legal) ground exists for imputing to the principal any *mala fides*. He gains no undue advantage.

If the knowledge of the agent was acquired in the course of the transaction for which he was employed, the knowledge must, in the nature of things, have been in his mind, and hence is imputable to his principal. But if the knowledge was acquired at another time, in another transaction, the law makes no presump-

tion on the subject, and it becomes a question of actual proof. If the testimony demonstrates that the knowledge was in the agent's mind the rule then applies.

These rules are simple, and entirely rational, based on common knowledge and sound philosophy. They present in themselves no difficulties, and the only questions that can arise are as to their applicability to a particular state of facts. As showing how far eminent Courts have gone in imputing to a principal the knowledge gained by an agent in another transaction for another principal, a recent case in the Court of Appeals of the State of New York (not, we be lieve, cited in argument or briefs in this case), may be of interest.

The case of McCutcheon *v.* Ditmann, 164 N. Y., 355, presented the following situation :

Calman, as attorney for Isaacs, an attaching creditor of Ditmann, learned that McCutcheon owned an equity in stock in possession of Ditmann. Later, Calman became attorney for Ditmann, and had charge of the sale of the same stock. The sale was found to be irregular and wrongful. Isaacs bought the stock ; the *bona fides* of his purchase was disputed.

The Court said (p. 357) :

> " It is undoubtedly the settled rule that a principal is only chargeable with notice communicated to or knowledge acquired by his agent in another transaction and when he was acting for another principal, when clear proof is made that the knowledge or notice was present in the mind of the agent

at the time of the transaction in question (Constant *et al*, Executors *et al*, *v.* University of Rochester, 111 N. Y., 604, 611.) S. Isaacs and Company are not only brought within the rule stated, *but the facts show essentially one transaction* in the interest of S. Isaacs, which renders the rule inapplicable.

* * * * *

" It is evident that the precise knowledge of this situation was in the mind of the attorney at the time of the sale, within the rules referred to above, so that it is of no importance whether he was acting for Ditmann or S. Isaacs & Company. It is equally apparent that these facts show one transaction in regard to the stock."

The Circuit Court attempted in the case at bar to avoid the imputation of knowledge to Wallace by the following reasoning :

" To the general rule, etc., there is an exception which is well settled.

The exception is that when in the transaction of business the agent really acts for his own benefit or for the benefit and advantage of the other party to the transaction, notice to him is not deemed constructive notice to the principal."

Record, p. 52.

If this means that where the agent has so acted as to rupture the fiduciary relation the rule cannot apply we do not dissent from the proposition (*vide supra*).

But here there was no fraud ; no act which could have justified a repudiation of Prince's

agency or a severance of the relation on the part of Wallace and Company. Nor did they make any such claim. Prince and Company concealed nothing from Wallace.

The eminent counsel for the plaintiff says "that in the sale of these bonds, F. H. Prince and Company were 'openly and avowedly' acting as agents for Coffin and Stanton and not as agents of E. G. & E. Wallace."

Brief for petitioner, p, 266.

But Prince sold the belting stock for Wallace, taking the Santa Cruz bonds in payment and received the sum of $2,500 for his services. Wallace evidently found no fault with his agent. Had Wallace dealt directly with Coffin and Stanton he would have seen the ordinances and would admittedly not have been a *bona fide* purchaser.

The mediation of Prince enabled Wallace to dispose of his Belting Company stock without seeing the ordinances and thus plead blissful ignorance. But, says the Circuit Court, "said purchase and exchange *was made by the firm of F. H. Prince and Company, acting as agents of E. G. and E. Wallace and Company*, and also acting for Coffin and Stanton in the *same transaction*." Yet the latter relation was admittedly "open and avowed," hence not fraudulent, and thus there is no fact in the case to contradict or minimize the statement of the finding that Prince were "acting as agents of" Wallace in this one transaction.

We therefore insist, and claim without fear of

contradiction, that in ultimate analysis the single circumstance upon which the Circuit Court and plaintiff rely in order to make of the *mala fides* of Prince, the *bona fides* of Wallace is "the open and avowed" fact that Prince received a commission from Coffin and Stanton.

We have, therefore, this new and anomalous rule grafted on the law that where an agent acting without fraud "openly and avowedly" accepts a commission of the vendee the principal ceases to be chargeable with his knowledge gained in the "same transaction" for which he was employed. He has only to keep his eyes tightly shut and reap the benefit of any transaction which his more enlightened agent may enter into. In other words, pure water may be derived from a tainted source.

This doctrine we respectfully submit never has found and never can find favor with the honorable Court. That the decision herein apparently sanctions it, although we do not believe such to have been the intention, seems to us good ground for reargument.

In addition to the foregoing consideration, we call attention to the finding of the Circuit Court, not mentioned in the opinion of this Court, that Dickinson, the attorney retained by Prince and Company, solely at the suggestion of Wallace and Company, was not the agent or attorney of Wallace. Such finding seems so manifestly at variance with all the evidence on the point that we beg respectfully to call the attention of this honorable Court specifically thereto.

Finally, the multiplicity of detail and the very numerous and intricate questions rendering the case quite exceptional, prevented counsel from presenting within the time allotted for oral argument the matters involved in a manner compatible with the interest of your petitioner, the city and people of Santa Cruz.

WHEREFORE, your petitioner prays this Honorable Court that an opportunity be afforded to reargue this cause, and that pending such reargument and the determination thereof, the issue of the mandate herein be stayed.

And the undersigned members of the Bar of this Honorable Court humbly conceive it proper that the appeal therein should be reheard by the Court, if this Court, shall see fit so to order.

All of which is most respectfully submitted.

THE CITY OF SANTA CRUZ,
Petitioner.

New York, 25 March, 1902.

FREDERIC R. COUDERT, Jr.,
PAUL FULLER,
Counsel.